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CHRISTINE DICK, Plaintiff, Cross-Defendant, and Appellant, v. PACIFIC HEIGHTS TOWNHOUSES et al., Defendants and Respondents; HUBER PROPERTY MANAGEMENT, Defendant, Cross-Complainant, and Respondent.

C037044

COURT OF APPEAL OF CALIFORNIA, THIRD APPELLATE DISTRICT

2002 Cal. App. Unpub. LEXIS 8957

September 25, 2002, Filed

NOTICE:
[*1] NOT TO BE PUBLISHED CALIFORNIA RULES OF COURT, RULE 977(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR PURPOSES OF RULE 977.

PRIOR HISTORY:
Placer. Super. Ct. No. SCV-7526.

DISPOSITION:
Affirmed.

JUDGES:
RAYE, J. We concur: SCOTLAND, P.J., HULL, J.

OPINIONBY:
RAYE

OPINION:

In this landlord-tenant dispute, the court, sitting as the trier of fact, was asked to determine whether a broken sewer pipe outside a townhouse and mold in the tenant's garage rendered the unit uninhabitable and caused the tenant to become ill. The court found the tenant, plaintiff Christine Dick, had not sustained her burden of proving that either the pipe or the mold caused her condition. Although the court found there had been a broken sewer pipe and mold, it did not make any finding on habitability. It denied defendant Huber Property Management, Inc.'s recovery on its cross-complaint for unpaid rent and various charges. Plaintiff alone appeals.

Plaintiff challenges the exclusion of evidence and the application of the substantial factor test in determining causation. **[*2]** On those issues we are constrained to affirm by well-worn principles of appellate review. Plaintiff also argues she is entitled to an abatement of all her rental payments because the townhouse was uninhabitable as a matter of law and causation is not an element of a cause of action for the implied warranty of habitability. The record belies her contention that the premises were uninhabitable for the entire term of her three leases as a matter of law. Nevertheless, we must remand the case to the trial court to determine when the unit became uninhabitable, if at all, and to calculate how many months, if any, she was entitled to abate her

rent. The statement of decision is deficient in this regard. In all other respects, the judgment is affirmed.

FACTUAL BACKGROUND

There are few undisputed facts. In April 1996 plaintiff, recently divorced and suffering from an attention deficit hyper-disorder, moved into a rental unit owned by Pacific Heights Townhouses. Because many of the garages in the units were built into a slope, the managers were aware that, at times throughout the year, water pooled in some of the garages. They made platforms available to the tenants and warned them not **[*3]** to store personal belongings on the ground. Plaintiff signed three six-month leases. She was evicted, however, at the end of her third term for failure to pay rent. Nearly all other pertinent facts are disputed.

Plaintiff's Testimony

Plaintiff claimed that before moving into her townhouse, she was a vivacious, successful, and physically active businesswoman. She considered her attention deficit disorder an asset throughout her career, enabling her to work long hours and to do many things at once. She had boundless energy and, according to her testimony at trial, loved life, enjoyed multiple sports and outdoor activities, and exuded happiness. That all ended after moving into the townhouse.

About seven months after moving in, plaintiff retrieved her Christmas decorations from the garage and noticed that the boxes were damp. While she had previously observed some standing water in the garage and a white salty material on the cinder block wall, she noticed that the water and salt-like material were spreading. She informed the on-site managers. She also saw round black splotches on the ceiling in the garage. Around the same time, she noticed dampness and moss around the outside **[*4]** air conditioning unit, dampness in a kitchen cabinet, a rusty electrical socket in the garage, and a foul odor in the kitchen. A few months later she experienced flu-like symptoms, including diarrhea, nausea, retching, a continuous cough, fatigue, weight loss, and a low-grade fever.

In March 1997 plaintiff decided to clean the mold and the salt-like material with the on-site managers' blessing. She used a disinfectant in the garage on a regular basis. In June the on-site managers suggested plaintiff get an air purifier. She did. She also put duct tape around the windows in her upstairs bathroom.

On October 1, 1997, plaintiff asked her boyfriend to seal the cinder block wall. In preparation for that project, he dug into the adjacent soil to determine whether there was a leaking pipe. As he dug, he discovered a broken sewer pipe. The pipe was covered with slimy sewage that smelled like human waste. Plaintiff's boyfriend collected soil samples and took them to a laboratory for testing. A maintenance man repaired the pipe, and the plumber who checked his work found two other broken sewer pipes. Plaintiff then suspected there was a connection between the broken pipe and her illnesses. **[*5]**

Plaintiff saved the contents of a vacuum cleaner bag and a filter from her air purifier. She was diagnosed with bronchitis in June 1997 and moved out of the unit in early November 1997. Plaintiff testified she lost over 30 pounds, became depressed, and was unable to work. Skin lesions appeared on her face, ears, torso, and legs.

Defendants' Testimony

The defense presented an entirely different portrait of plaintiff and her complaints. According to the defense, plaintiff had a history of mental illness, an eating disorder, a nasty divorce, a less than stellar employment record, and preexisting injuries suffered in an earlier automobile accident. Just before moving into the townhouse, she had taken a long vacation to Europe and had little interest in securing and maintaining a job, which might have risked a reduction in spousal support. The defense argued that her long list of maladies was unrelated to living in the townhouse.

The defense presented evidence that the owners of Pacific Heights Townhouses through their property managers were proactive in discovering problems and responsive in remedying any problems reported by their tenants. They hired managers to live on the **[*6]** premises to be available to tenants around the clock. They conducted random inspections of the property and hosted social events for the tenants to assure that the property was well maintained and the tenants had ample opportunity to express any dissatisfaction they had regarding the units or the grounds. They prepared a videotape for tenants to watch before moving in to alert them to their rights and duties under their leases. An owner who testified at trial expressed pride in the development and an ongoing commitment to maintaining the quality of the homes.

The property manager also testified at some length. She explained that plaintiff had not complained of mold or of illness before she moved out. She signed two leases after living in the unit and without lodging any complaint. She made only one request for maintenance and that was for the installation of new blinds. The property manager insisted that the broken sewer pipe was fixed immediately, and within two weeks, the entire system had been checked. She acknowledged that because of the construction of the units, there had been water in some of the garages. But she insisted that the sprinklers were adjusted seasonally and, while **[*7]** the entire system may have run for up to an hour, each segment was timed to run for only 15 to 20 minutes.

The on-site manager testified that many of the tenants suffered upper respiratory illnesses that they attributed to the removal of contaminated dirt from a park across the street from the complex. Two former tenants also testified that they had observed a salt-like material in their garages and a black substance growing on their garage walls. Neither complained. One tenant's personal property was damaged by moisture in the garage and his wife experienced respiratory problems.

Expert Testimony

Plaintiff claimed she suffered from mold toxicity. Two medical doctors and an environmental consultant substantiated her claim. According to her medical experts, only 1 percent of practicing physicians are aware of the health risks associated with mold, but the two doctors who testified disagreed on the appropriate treatment for plaintiff's symptoms. Nevertheless, they opined that the symptoms she evidenced were consistent with mold toxicity and that those symptoms could be expected to continue even though she no longer was exposed to the mold.

The environmental consultant relied **[*8]** on photographs of the garage and the results of the laboratory analysis on the samples collected by plaintiff from the vacuum cleaner bag and the air filter. Those samples were collected in September and October of 1997 and were tested 18 months later. Nevertheless, he

opined that water intrusion caused the growth of various molds on the surface of the wallboard, including highly toxic and dangerous molds. He also reviewed the results of the tests performed on the fecal material collected by plaintiff's boyfriend and concluded the results were significant because the sewage acts as a fertilizer for mold growth. He believed that the mold in the garage had been drawn into the dwelling areas of the townhouse through tiny cracks and holes in the walls. Plaintiff had also been exposed to the spores and toxins as she attempted to clean the mold in the garage.

A microbiologist for the defense disputed these findings. First, he discounted the validity of any findings because there were no controls in place when the samples were taken. Second, he found the results of the tests unremarkable. As for the sewage contamination, he testified that fecal coliforms are ubiquitous and that foods often **[*9]** contain levels significantly higher than the levels found in the sample. In fact, those levels were not only safe to eat, but to swim in.

The Statement of Decision

The trial court sustained plaintiff's allegation of a broken sewer pipe and mold but declined to find that either the broken pipe or the mold was a substantial factor in bringing about plaintiff's illnesses. The court wrote: "While it is certain from photos and other evidence that mold and the broken sewer pipe existed, the causal link between those conditions and the plaintiff's condition are too tenuous upon which to impose liability upon the defendants. The vacuum bag evidence which was supposedly preserved in this case which showed the existence of toxins and molds was gathered in a far less than scientific method, and the methods of its preservation limits its evidentiary value." The court entered judgment for defendants on the complaint and for plaintiff on the cross-complaint.

DISCUSSION

I

This case provides yet another illustration of the limited scope of appellate review. It is not, as plaintiff suggests, a case on the scientific viability of toxic mold claims. Plaintiff raises no issue regarding **[*10]** the admissibility or exclusion of expert testimony on toxic molds. Moreover, when the twelfth juror had to be excused for hardship in the midst of the trial, plaintiff chose not to retry the case or to accept a verdict by the remaining 11 jurors. As a consequence, the judgment does not embody a jury's assessment of a toxic mold claim. Rather, a single judge resolved highly contentious and disputed facts, and therefore, we must review the court's findings that plaintiff did not sustain her burden of proving that either the broken pipe or the mold caused her illnesses.

Causation

We begin with the issue of causation. Plaintiff alleged causes of action for breach of the implied warranty of habitability, negligence, nuisance, the intentional infliction of emotional distress, and constructive eviction. The court found that causation "is inescapably part of each cause of action." Plaintiff asserts that causation is not an element of the breach of the implied warranty of habitability. She also contends the court improperly applied the substantial factor test in determining she had not sustained her burden of

proving causation. We turn our attention to the second contention first [*11] because it involves four of the five causes of action.

Substantial Factor Test

Plaintiff's argument is difficult to decipher. She first asserts that the trial court misapplied the substantial factor test, analogizing toxic mold to asbestos. But she then argues that the substantial factor test itself is flawed when applied to toxic torts, citing as her sole authority the dissent in *Cottle v. Superior Court (1992) 3 Cal.App.4th 1367* (*Cottle*). She insists "the trial court committed prejudicial reversible error when it failed to properly apply the substantial factor test in view of the ability of medical science and medical doctors to prove with a specific test the mold-exposure injury," but she concludes that "the substantial factor test must be made to account for the difficulties in establishing causation when contact occurs at a microscopic level and the damage resulting from the toxic exposure is not yet fully explored by the medical profession." Thus, plaintiff's description of the error remains rather murky. We are left to wonder whether she is complaining about the deficiencies in the substantial factor test, the deficiencies in science, or the deficiencies [*12] in how the test was applied.

Plaintiff urges us to consider the difficult issues of causation in asbestos-related cases and, in particular, *Rutherford v. Owens-Illinois, Inc. (1997) 16 Cal.4th 953, 941 P.2d 1203* (*Rutherford*). She relies on *Rutherford's* admonition not to place undue emphasis on the word "substantial" and thereby dilute a defendant's liability for the harm it brings about. (*Id. at p. 969.*) There is nothing new or remarkable about the court's recitation of the substantial factor test. "Generally, the burden falls on the plaintiff to establish causation. [Citation.] Most asbestos personal injury actions are tried on a products liability theory. In the context of products liability actions, the plaintiff must prove that the defective products supplied by the defendant were a substantial factor in bringing about his or her injury." (*Id. at p. 968.*) Accepting the substantial factor test for cause-in-fact determinations as articulated in the Restatement Second of Torts, the court instructed: "Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. [Citations. [*13]] The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct." (*Id. at pp. 968-969.*)

Yet *Rutherford* is an odd case for plaintiff to cite given the court's sound rejection of expanded notions of causation in a toxic tort case. The plaintiff sought to shift the burden of proof because it was difficult to prove that a product containing asbestos caused the plaintiff's injuries. The plaintiff requested the trial court to instruct the jury that the defendant was required to prove the product had not been a substantial factor in causing the plaintiff's illness. The Supreme Court refused such a shifting of the burden of proof as a fundamental and unnecessary departure from the traditional substantial factor test. (*Rutherford, supra*, 16 Cal.4th at p. 977.)

Apparently hampered by her inability to find authority for the novel proposition that a trial court should redefine the legal standard to fit the facts before it, plaintiff relies on the lonely voice of dissent in *Cottle, supra* [*14] , 3 Cal.App.4th 1367. But even if we were to embrace the spirit of the dissent, we cannot accept plaintiff's creative departure from the substantial factor test.

In *Cottle*, the trial court prevented the plaintiffs from offering any evidence that a toxic dump had caused their illnesses and birth defects because they failed to make a prima facie showing of causation. (*Cottle, supra*, 3 Cal.App.4th at p. 1375.) Here, the trial court admitted volumes of expert testimony that plaintiff suffered from mold toxicity as a result of defendants' dereliction of their duties. The trial court, after hearing all of the evidence, simply concluded that the causal link was too tenuous or, in other words, there was insufficient evidence that the mold and toxins were a substantial factor in bringing about the alleged injury. Whereas Justice Johnson was concerned that the court had overstepped its inherent powers in handling complex civil litigation by depriving litigants of the opportunity to try their cases without complying with summary judgment procedures (*id.* at pp. 1389-1390 (dis. opn. of Johnson, J.)), the tenant here was afforded a three-week trial and the opportunity to present **[*15]** a multitude of expert witnesses to support her claims. Hence, there is no issue of fundamental fairness to justify tinkering with the substantial factor test.

Nevertheless, plaintiff insists the trial court committed prejudicial error by failing to adjust the substantial factor test to accommodate the difficulty of proof. She complains that the court committed prejudicial error by failing to account for the fact that medical testing for mold toxicity is relatively undeveloped. In short, the argument fails for lack of authority to support it. Moreover, the issue, though presented as a question of law, is nothing more than a camouflaged challenge to the sufficiency of the evidence to support a factual finding. Here, as we outlined above, there is ample evidence to support the trial court's conclusion that plaintiff failed to prove her mold toxicity claim.

Plaintiff reargues the facts at length, but she cannot overcome the insurmountable obstacle that her impressive array of experts relied on the samples she collected from a vacuum cleaner bag and an air filter. The trial judge was unimpressed by scientific evidence collected by a litigant and tested a year and one-half later. By then, **[*16]** of course, she had been evicted and had filed this lawsuit. The court, sitting as the trier of fact, had the prerogative to reject plaintiff's expert opinions, predicated as many of them were on the samples she collected, and to accept those opinions offered by the defense. There is ample evidence to support the court's finding and nothing in this record to support plaintiff's theory that the court either misunderstood or misapplied the substantial evidence test.

Implied Warranty of Habitability

Landlords in this state impliedly warrant that the residential premises they lease are habitable and will remain habitable for the duration of the lease. (*Green v. Superior Court (1974) 10 Cal.3d 616, 637, 111 Cal. Rptr. 704, 517 P.2d 1168 (Green)*.) A tenant may fix and repair uninhabitable premises as provided by section 1941 et seq. of the Civil Code, bring an independent action for breach of the implied warranty of habitability, or raise the landlord's breach as a defense in an unlawful detainer action. (*Green, supra*, 10 Cal.3d at pp. 629-636.) Laws listing specific housing requirements provide "helpful guidance in determining whether a landlord has **[*17]** satisfied the common law warranty of habitability." (*Id. at pp. 637-638, fn. 23.)*

In her first cause of action for breach of the implied warranty of habitability, plaintiff alleged: "At the time plaintiff took possession, or shortly thereafter, the premises were uninhabitable and unfit for human occupation in that, among other things, the plumbing was inadequate and had a sewage line which leaked into the soil near the plaintiff's apartment, into the

walls of plaintiff's apartment, and into the ventilation system thereof. None of these conditions was known to plaintiff at the time plaintiff moved into the premises.

". . . Approximately one year after plaintiff moved into the premises, she complained to the on-site manager that she had problems in her apartment including damp walls and water seepage on the floor of her garage. Plaintiff sought medical treatment for respiratory problems which she had. From that point plaintiff became increasingly aware of the numerous defective and dangerous conditions listed above. Plaintiff also became increasingly aware that respiratory and other health problems she had experienced were related to being inside the premises.

". **[*18]** . . In or about October, 1997 plaintiff dug up some soil near the garage of the premises and discovered a sewage line which was broken. Subsequent testing indicated the presence of coliform in and around the premises. Plaintiff discovered that mold spores also permeated the inside of her apartment and had gotten into the ventilation system.

". . . Commencing in or about Spring of 1997, and continuing through October 1997, plaintiff repeatedly notified defendant, of the dampness in the garage and apartment and requested that defendant have them repaired, but defendant failed to repair them or to have them or any of them repaired, within a reasonable time, or at all or specify which repairs were made and which were not made."

Plaintiff argued in her trial brief and during closing argument that defendants had breached the implied warranty of habitability. She claimed the breach provided a defense to the cross-complaint and gave rise to the right to damages. The trial court ruled in favor of plaintiff on the cross-complaint, but it made no findings on habitability. In her objection to the proposed statement of decision, plaintiff complained that "it cannot be ascertained from the intended **[*19]** decision the basis for the court's decision in favor of Christine Dick and against Pacific Heights Townhouses, et al., on the cross-complaint." The court provided no further clarification.

On appeal, plaintiff urges us to rule de novo on the issue of habitability. Relying on the court's factual findings that there was mold and a broken sewer pipe, she insists the townhouse was uninhabitable. She contends her rent should be abated for the entire time she lived at the Pacific Heights complex.

The failure to make findings on the material issues raised by plaintiff constitutes reversible error. (*Vezaldenos v. Keller (1967) 254 Cal. App. 2d 816, 829, 62 Cal. Rptr. 808.)* We agree with her that the issue of habitability was raised by the pleadings, adjudicated at trial, and preserved by her objection to the intended statement of decision. We disagree, however, that because causation is not an element of the breach of the implied warranty of habitability, we can decide the issue as a matter of law. The resolution of this issue, including any calculation of damages, turns on the resolution of many factual disputes.

The trial court, as the trier of fact, must determine when, **[*20]** if at all, the premises became uninhabitable. The evidence is conflicting. While plaintiff claims the plumbing was inadequate in that the sewage line leaked near her apartment from the time she took possession, there was evidence the broken pipe was not discovered until a year and one-half later. There was evidence that the pipe was repaired as soon as it was discovered. Similarly, plaintiff testified she noticed a small amount of water pooling in her garage in the spring of 1996, but she did not notice the damp boxes, the mold, or the growing pool of water until November or later. There was some evidence of mold in the interior of the house, but the parties disputed whether it was caused by mold

traveling up through the walls in the garage or from the additional moisture resulting from plaintiff's taping of the windows in the bathroom. We must defer to the trial court to resolve these, and any other, factual disputes necessary to determine if, and when, the townhouse became uninhabitable.

We must, however, answer two ancillary issues. Plaintiff seems to assume that because the court found there was a broken sewer pipe and mold, the townhouse was uninhabitable. That is not the law. **[*21]** "[The] implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained." (*Green, supra,* 10 Cal.3d at p. 637.) There was little evidence to suggest that the presence of even a trace of mold would render residential premises uninhabitable. To the contrary, there was expert testimony that mold is ubiquitous. The question then is not whether there was mold but how much and what kind. In other words, was the presence of the mold toxic? The trial court's mere observation that mold was present does not resolve whether it had become a general health risk to tenants. There is substantial evidence in this record to support a finding either way.

Plaintiff cites to various housing code standards as reflective of habitability. In particular, she points out that Health and Safety Code section 17920.3, subdivision (a) provides that any building or portion thereof, including a dwelling unit, is substandard where conditions exist that endanger the life, limb, health, property, safety, and welfare of the occupants thereof, including in relevant **[*22]** part: "(7) . . . improper operation of required ventilation equipment[;] [P] . . . [P] (11) dampness of habitable rooms[;] [P] . . . [P] (13) general dilapidation or improper maintenance[; and] [P] (14) lack of connection to required sewage disposal system." She also relies on Civil Code section 1941.1's definition of tenantable dwellings wherein there must be proper waterproofing and plumbing, and clean and sanitary buildings, grounds, and appurtenances.

There is no question that these statutes are relevant to a determination of habitability. (*Green, supra,* 10 Cal.3d at pp. 637-638, fn. 23.) Nor is there any question that toxic mold and spewing sewage render residential premises uninhabitable under these sections. The question remains, however, whether and when the broken pipe and the mold were serious enough to threaten plaintiff's health.

The second ancillary issue is defendants' contention that issues of habitability do not apply to a garage. It relies on the definition of dwelling unit provided in Civil Code section 1940, subdivision (c) as "a structure or the part of a structure that is used as a home, residence, or sleeping place by one person who maintains **[*23]** a household . . . ." According to defendants, since plaintiff was not living or sleeping in the garage, it does not qualify as a part of the dwelling unit.

Defendants' argument is utterly without merit. First, the various housing codes are merely a guide to establishing habitability. Second, defendants fail to cite any case authority for the proposition that if a garage contained toxic substances the residential premises would be considered habitable despite the risk to the health and safety of the occupants in utilizing their garage. Third, we conclude that defendants' argument is at odds with public policy as embodied in the housing codes and cases on habitability. A tenant reasonably expects that a garage included under a lease would not pose a health hazard to anyone who either uses the garage or lives in the attached unit.

II

Plaintiff complains that the trial court erroneously excluded evidence that a former tenant suffered from bronchitis during and after the time she lived at the townhouse complex. The court sustained multiple relevancy objections. Plaintiff argues the error was prejudicial because the court concluded in its statement of decision that the absence of **[*24]** evidence of other claims of illness was "noteworthy." We conclude that even if the exclusion of the evidence was error, the error did not result in a miscarriage of justice. (Evid. Code, § 354.)

The court did allow the admission of evidence of other illnesses. The on-site manager testified that many of the tenants suffered from upper respiratory illnesses. Another former tenant testified his wife experienced respiratory problems that required medication while they lived at Pacific Heights.

There is no indication in the record why the court excluded one tenant's description of her bronchitis while allowing the other evidence. Both former tenants lived in the same building, which was not the building in which plaintiff resided. Nevertheless, the exclusion of evidence of one tenant's bronchitis was not prejudicial.

The statement of decision is somewhat ambiguous. It reads: "Furthermore, while not dispositive, it is noteworthy that Plaintiff's was apparently the only claim of illness based upon the condition of the premises." Plaintiff complains that the language "while not dispositive" did not appear in the intended decision. However, it is the signed statement of decision, and not **[*25]** the tentative ruling, that is reviewed on appeal.

More significantly, however, the court's statement seems to reflect that no other tenants had lodged a formal complaint or filed a lawsuit alleging the condition of the premises had caused their illnesses. The statement does not say there was no evidence anyone else had become ill.

Whatever the meaning of the court's reference to other illnesses, there is no reasonable probability that admission of the former tenant's bronchitis would have impacted the outcome in this case. The court heard testimony that other residents had also suffered upper respiratory illnesses. Another example of bronchitis would hardly have made any difference. The dispositive fact remains that the court found plaintiff had not sustained her burden of proving that either the mold or the broken sewer pipe caused her assorted symptoms. The condition of other units in other buildings may have been relevant, but the fact that one tenant in another building might have suffered bronchitis would not have compelled or even persuaded the court to conclude that plaintiff's premises caused her illnesses. There is no prejudicial error.

DISPOSITION

The case is remanded **[*26]** to the trial court to determine when, if at all, the premises were uninhabitable and to calculate the amount of the rent to be abated. In all other respects, the judgment is affirmed. The parties shall bear their own costs on appeal.

RAYE, J.

We concur:

SCOTLAND, P.J.

HULL, J.